(3)

Supreme Court, U.S.
FILED
JUL 7 1997
OFFICE OF THE CLERK

No. 96-1878

*IN THE*

*SUPREME COURT OF THE UNITED STATES*

---

OCTOBER TERM, 1996

---

OMNI HOMES, INC.,

*Petitioner,*

v.

BOARD OF SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA,

*Respondent.*

---

ON APPEAL FROM
THE SUPREME COURT OF VIRGINIA

# PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Mark A. Moorstein, Esquire*
James A. Yergin, Esquire
*Counsel of Record
Mark A. Moorstein, P.C.
10500 Battleview Parkway
Manassas, Virginia 20109
(703) 361-6500

13 pp

## TABLE OF CONTENTS

**TABLE OF CONTENTS** ..... i
**TABLE OF AUTHORITIES** ..... ii
**ARGUMENT**

I. **The County's Statement Of The Case Is Incorrect.** ..... 1

II. **The Property Right At Issue Is Omni's Right To Use Its Property Free From Government Interference That Does Not Advance A Substantial State Interest.** ..... 2

III. **The Important Federal Question Of Whether There May Be A Partial Compensable Regulatory Taking Of Private Property Under The Fifth Amendment To The United States Constitution Was Raised And Addressed Below.** ..... 5

IV. **The County's Assertion That This Court Has Already Decided That There Can Be No Partial Regulatory Takings Is Incorrect.** ..... 6

**CONCLUSION** ..... 8

## TABLE OF AUTHORITIES

I. Constitution.

Fifth Amendment to the
U.S. Constitution .....5, 6

II. Cases.

Bartz v. Board of Supervisors of Fairfax County,
237 Va. 669, 672, 379 S.E. 2d 356, 358 (1989).....4

Board of Supervisors of Prince William County,
Virginia v. Omni Homes, Inc., 253 Va. 59,
481 S.E.2d 460 (1997) .....7

Buchanan v. Warley, 245 U.S. 60, 74, 38 S.Ct. 16,
62 L. Ed. 149 (1917).....2

Concrete Pipe and Products of California, Inc.
v. Construction Laborers Pension Trust
for Southern California, 508 U.S. 602,
643-47 (1993) .....7

Creppel v. United States, 41 F.3d 627 (Fed. Cir. 1994)
.....7

Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560
(1994) .....7

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419, 435, 102 S.Ct. 3164,
73 L. Ed. 2d 868 (1982).....2

**Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171 (Fed. Cir. 1994).....6, 7**

**Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) .....4, 5, 6, 7**

**Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., 65 F.3d 1113, 1123 (4th Cir. 1995) .....7**

**Richmond, Fredericksburg & Potomac Railroad Company v. Metropolitan Washington Airports Authority, 251 Va. 201, 468 S.E.2d 90 (1996).....4**

**United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945).....2**

**III. Treatises.**

**Bentham, Theory Of Legislation, Principles Of The Civil Code, Part I, Dumont, ed. Hildreth, Trans. (1864).....3**

## ARGUMENT

### I. *The County's Statement Of The Case Is Incorrect*

**The County's Statement Of The Case mischaracterizes the issues that were before the trial court, the trial court's findings and decision as well as the basis for those findings and decision. It slants the County's conduct in such a way as to render the County's obvious wrongs spuriously acceptable.**

**A review of the trial court's detailed and thorough analysis and decision (Appendix, pp. A-2 to A-33) shows that, notwithstanding the County's many attempts at framing the wrong issues, the County engaged in conduct that was both designed and executed in a way to illegally and unconstitutionally interfere with Omni's right to use Omni's own property. (Appendix, page A-11 to A-14).**

**The County's attempt to characterize its conduct as an unrelated set of innocent governmental actions that may have coincidentally and unintentionally affected Omni's planned use of its property is neither supported by the evidence nor the findings of fact made by the trial court.**

**Even the Supreme Court of Virginia limited its decision solely to the trial court's supposed error in interpreting the law. (Appendix, page A-39). It did not reverse any of the trial court's findings of fact. Those findings of fact should be used as the basis for ruling on Omni's Petition and not the County's assertions that contradict those findings.**

## II. *The Property Right At Issue Is Omni's Right To Use Its Property Free From Government Interference That Does Not Advance A Substantial State Interest.*

**In its Brief In Opposition, the County sets up the false premise that the property right at issue is Omni's right to use the neighboring property for road and utility access. It is the same mistake made by the Supreme Court of Virginia when it ignored the finding of the trial court that the property right at issue is "the right of Omni to use its property, and to do so at a density permitted under R-10 zone." (Appendix, page A-31).**

**The trial court's finding is in accord with this Court's description of property rights as "the rights 'to possess, use and dispose of [a thing].'" Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 102 S.Ct. 3164, 73 L. Ed. 2d 868 (1982)(quoting United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 89 L.Ed. 311 (1945)); see also Buchanan v. Warley, 245 U.S. 60, 74, 38 S.Ct. 16, 62 L. Ed. 149 (1917) ("Property is more than the mere thing . . . . It includes the right to acquire, use, and dispose of it.")**

> **The idea of property consists in an established expectation; in the persuasion of being able to draw such or such advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am**

> **able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest. . . . As regards property, security consists in receiving no check, no shock, no derangement to the expectation, founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.**

**Bentham, Theory Of Legislation, Principles Of The Civil Code, Part I, 111-113, Dumont, ed. Hildreth, Trans. (1864).**

**Omni has never argued that it had a property right in the neighboring property nor did the trial court find that the existence of such a right was necessary for a taking of Omni's property. The crux of this case is that the County decided to block Omni's lawful use of Omni's property for reasons that did not substantially advance legitimate governmental interests. The purchase of the neighboring property was just the final act in accomplishing that improper and unconstitutional goal. It was not the innocent purchase of neighboring property for the good of the whole community (e.g. for the construction of a firehouse). It was the culmination of a systematic effort to improperly interfere with Omni's lawful right to use and develop its own property.**

**As cited by the County in its Brief In Opposition, this Court has held that the proper antecedent inquiry in this type of case is a determination of the nature of the owner's estate to see if the proscribed use interests were**

**part of his title to begin with. Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 120 L.Ed.2d 798, 820 (1992). It is a question of "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." Lucas, 120 L.Ed. 2d at 814 (fn 7).**

**In Virginia, a landowner's ability to *use and control* his property is a fundamental and constitutionally recognized and protected property right. See, Bartz v. Board of Supervisors of Fairfax County, 237 Va. 669, 672, 379 S.E. 2d 356, 358 (1989); see also, Richmond, Fredericksburg & Potomac Railroad Company v. Metropolitan Washington Airports Authority, 251 Va. 201, 468 S.E.2d 90, 97 (1996) (government action to prevent development constitutes inverse condemnation).**

**The trial court correctly made the determination that the property rights at issue were Omni's control over its own land and its right to use and develop its own property as planned under the existing R-10 zoning. (Appendix, page A-31). The trial court found that this was indeed a protected property right based upon Omni's reasonable investment-backed expectations that the County would not interfere except to advance substantial state interests. (Appendix, page A-28).**

**The fundamental flaws in the decision of the Supreme Court of Virginia (which the County now seeks to perpetuate) were the Supreme Court of Virginia's refusal to address the correct property right at issue as well as the reasons for the County's actions. It is analogous to a finding in a murder case that, even though it was proved beyond a reasonable doubt that the criminal defendant shot the victim in cold blood, he could not be guilty of murder because he had a permit to own**

**the murder weapon. In Omni's case the County had the statutory power to purchase the neighboring property and deny Omni road and utility access but it was a violation of Omni's property rights for the County to do so for reasons that did not advance substantial state interests.**

**Omni had the clear right to develop its property free from the interference of the County except for reasons that advanced substantial state interests. That is the property right that is at issue, not Omni's right in the neighboring property and it is why the character of the County's actions cannot be ignored.**

## III. *The Important Federal Question Of Whether There May Be A Partial Compensable Regulatory Taking Of Private Property Under The Fifth Amendment To The United States Constitution Was Raised And Addressed Below.*

**The County's assertion that the issue of a partial regulatory taking was not raised or addressed below is absolutely false. The issue was extensively briefed both at trial and in the appeal to the Supreme Court of Virginia. The trial court clearly applied the *ad hoc* three part partial regulatory takings test. (Appendix, page A-25). Even the Supreme Court of Virginia utilized the test (albeit incorrectly, by not addressing the critical determination of the character of the governmental actions). (Appendix, page A-40 to A-41).**

**As the Supreme Court of Virginia stated:**

> **Nothing in Lucas, however, indicated an intent to limit compensable takings under the Fifth Amendment to [categorical**

> takings]. Courts considering the issue since Lucas have continued to resolve Fifth Amendment claims involving less than a categorical taking of property by utilizing the traditional three-part test.

Omni Homes, Inc., (Appendix, page A-41).

It is therefore baffling as to how the County can now assert that the issue was never raised or addressed below. The County's incorrect assertion can only be attributed to the County's confusion as to what constitutes a partial regulatory take. It is, of course, something less than a categorical take and it was that type of take that was addressed in the decision of the Supreme Court of Virginia in this case.

## IV. *The County's Assertion That This Court Has Already Decided That There Can Be No Partial Regulatory Takings Is Incorrect.*

In its Brief In Opposition, the County makes the incorrect assertion that this Court has consistently held that there can be no partial regulatory taking under the Fifth Amendment. In doing so, the County dismisses the discussion of the issue in Lucas as mere "musings."

The County's assertion also ignores the opinions of the Court of Appeals for the Federal Circuit. That court has held, post-Lucas, that there can be partial regulatory takings under the Fifth Amendment. Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171, 1179-80 (Fed. Cir. 1994).

As set forth in Omni's Petition, the Court of Appeals for the Federal Circuit has correctly summarized the status of the law on this issue as follows:

> **The question remains, does a partial deprivation resulting from a regulatory imposition, that is, a situation in which a regulation deprives the owner of a substantial part but not all of the economic use or value of the property, constitute a partial taking, and is it compensable as such? This question has been much debated in the literature since the Supreme Court's decision announcing that as a general proposition regulatory takings are compensable; the Court's decisions to date have not provided an answer.**

**Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560, 1568 (1994).**

**Even in its decision in this case, the Supreme Court of Virginia recognized that:**

> **Courts considering the issue since Lucas have continued to resolve Fifth Amendment claims involving less than a categorical taking of property by utilizing the traditional three-part test. See e.g., Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 643-47 (1993); Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., 65 F.3d 1113, 1123 (4th Cir. 1995); Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994); Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171, 1179 (Fed. Cir. 1994).**

Omni Homes, Inc., (Appendix, page A-40).

Given the status of the law on this issue, this case offers this Court the opportunity to clarify and resolve the issue of partial regulatory takes under the Fifth Amendment.

## CONCLUSION

The County's Statement Of The Case mischaracterizes the issues that were before the trial court, the trial court's findings and decision as well as the basis for those findings and decision. The trial court's findings of fact should be used as the basis for ruling on Omni's Petition and not the County's incorrect and contradictory assertions.

Omni had the clear right to develop its property free from the interference of the County except for reasons that advanced substantial state interests. That is the property right that is at issue, not Omni's right in the neighboring property, and it is why the character of the County's actions cannot be ignored.

The County's assertion that the issue of a partial regulatory taking was not raised or addressed below is absolutely false.

The County's assertion that this Court has already decided that there can be no partial regulatory takings under the Fifth Amendment is incorrect and this case offers this Court the opportunity to clarify and resolve that issue.

**Respectfully**
**Submitted,**

**Mark A. Moorstein, Esquire***
**James A. Yergin, Esquire**
***Counsel of Record**
**Mark A. Moorstein, P.C.**
**10500 Battleview Parkway**
**Manassas, Virginia 20109**
**(703) 361-6500**
***Counsel for Petitioner***